

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA

In re

Case No. 02-12556-DHW  
Chapter 7

JOWANNA FRANK DAWSEY,

Debtor.

BMW FINANCIAL SERVICES NA, LLC,

Plaintiff,

v.

Adv. Proc. No. 03-3028-DHW

JOWANNA FRANK DAWSEY and  
EMERY MATTHEWS,

Defendants.

MEMORANDUM OPINION

BMW Financial Services NA, LLC commenced this adversary proceeding pursuing various claims under state and federal law. The claims arise from the debtor's lease of a 2001 BMW 740IL from BMW and the debtor's alleged transfer of the vehicle to Emery Matthews.

BMW contends that the debtor fraudulently procured the lease by making false statements in the lease application. BMW also contends that the debtor fraudulently transferred the leased vehicle to Emery Matthews. BMW holds a state court prepetition judgment for the balance due under the lease.

The complaint comprises 10 counts. Counts 1 through 5 allege causes of action under 11 U.S.C. § 523 and 727. Counts 6 through 9 allege causes of action under state fraudulent conveyance law. Count 10 is an action for the value and use of the vehicle.

The debtor filed a motion to dismiss the complaint. Following a hearing, with the consent of BMW, the motion was granted with respect to Counts 5 and 10. The motion was denied with respect to the Counts 1 through 4. The court took the motion under submission regarding Counts 6 through 9.

Counts 6 through 9 assert that the transfer of the leased vehicle by the debtor to Emery Matthews is avoidable as a fraudulent conveyance under state law. See *Ala. Code* § 8-9A-1, *et seq.* (1975) and *Mich. Comp. Laws* § 566.31, *et seq.* (2002).

The debtor contends that the claims are barred under the doctrine of res judicata because BMW did not pursue the claims in the prepetition state court action for breach of the lease. BMW responds that the fraudulent transfer claims had not accrued when the state court action was filed because BMW did not learn of the transfer until after the debtor filed the chapter 7 petition.

Though there may be questions of fact concerning when the claims accrued, the court concludes for other reasons that the claims are due to be dismissed.

First, the court granted BMW relief from the automatic stay to enforce its ownership interest in the vehicle.<sup>1</sup> The stay lifted without any objection by the chapter 7 trustee. BMW is free to pursue its state law remedies outside of the bankruptcy court to obtain possession of the vehicle.

Second, it appears that BMW does not have standing to pursue the claims. Actions under 11 U.S.C. § 544(b) to avoid fraudulent conveyances under state law are generally reserved to the trustee. See *Flip Mortgage Corporation v. McElhone*, 841 F.2d 531 (4<sup>th</sup> Cir. 1988); *Unisys Corporation v. Dataware Products, Inc.*, 848 F.2d 311 (1<sup>st</sup> Cir. 1988); *Avalanche Maritime Ltd. v. Parekh (In re Parmetex, Inc.)*, 199 F.3d 1029 (9<sup>th</sup> Cir. 1999).

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<sup>1</sup> The motion for relief under 11 U.S.C. § 362(a) stated that Emery Matthews abandoned the vehicle, which is in the custody of a towing service.

Third, it does not appear that the court has jurisdiction of the claims. Resolution of the claims would not have an effect on administration of the chapter 7 estate. See *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 787 (11th Cir.1990). The parties do not dispute that the debtor leased, not purchased, the vehicle from BMW. The trustee did not assume the lease within the requisite time period, and the lease is now deemed rejected under 11 U.S.C. § 365(d)(1).

A separate order will enter in accord with this memorandum.

Done this 27 day of May, 2003.

/s/ Dwight H. Williams, Jr.  
United States Bankruptcy Judge

c: Arthur R. Medley, Attorney for Debtor  
W. Davis Malone, III, Attorney for Creditor

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ORDER DISMISSING COUNTS 6, 7, 8, AND 9

In accordance with the Memorandum Opinion entered this day, it  
is  
hereby

ORDERED that the debtor's motion to dismiss Counts 6, 7, 8, and  
9 of the complaint is GRANTED.

Done this 27 day of May, 2003.

/s/ Dwight H. Williams, Jr.  
United States Bankruptcy Judge

c: Arthur R. Medley, Attorney for Debtor  
W. Davis Malone, III, Attorney for Creditor